STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2008
v	No. 278446 Marquette Circuit Court
KEVIN RAY FISHER, Defendant-Appellant.	LC No. 07-044351-FH

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of possession of 50 or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 12 to 30 years in prison. For the reasons set forth below, we affirm.

I. Facts

Defendant's conviction arises from a seizure of cocaine by law enforcement officers during a search of a motel room in Marquette on December 29, 2006. The day before, Stephanie Felter, a housekeeper at the motel and acquaintance of defendant, rented the room for defendant and Lisa Betker. After learning that defendant had absconded from parole, Stephanie's estranged husband, Wesley Felter, phoned the Michigan State Police on December 29 to report that defendant was staying at the motel. State Trooper Robert O'Connor and Marquette City Police Officer Mark Hanes obtained information that defendant and Betker took a cab to a restaurant. Accompanied by a sheriff's deputy, they arrested defendant at the restaurant. Betker then consented to a search of the motel room.

During the search, law enforcement officers found $8,000 in bundled cash in a jacket hanging on a coat rack near the entry door. Cocaine and a number of other items, including male toiletries and marijuana, were found in a plastic Econo Food bag on a bed in the room. Plastic sandwich bags, rubber bands, and what appeared to be a ledger of drug transactions were also on the bed. Another $1,000 in bundled cash and a digital scale were found in a nightstand located between the two beds in the room. A marijuana joint was in the area of the nightstand.

Betker testified that the jacket belonged to defendant. She claimed that someone she did not know brought the Econo Food bag to defendant in the room, but denied seeing any drugs before the police search. The defense theory was that the cocaine came from someone other than

defendant. Defendant testified that a friend, Josh Willis, brought a bag of his personal hygiene items to the room, but that the bag did not contain drugs. He explained that he had approximately $9,000 in cash because he was planning to go to Grand Rapids to take the money to his mother's house and turn himself in for absconding on parole, but was arrested before he could do so.

II. Sufficiency of the Evidence

Defendant argues that the prosecution presented insufficient evidence to link him to the cocaine and to establish possession.[1]

Possession of cocaine may be actual or constructive. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Constructive possession exists if a person had a right to exercise control over the cocaine and knows of its presence. *Id.* The totality of the circumstances are considered in determining if there is a sufficient nexus between a defendant and the cocaine to establish constructive possession. *Id.* at 521.

Evidence showed that defendant and Ms. Betker shared the motel room where the cocaine was found. Although defendant's mere presence in the room is insufficient to prove constructive possession, *Wolfe, supra* at 520, defendant was circumstantially linked to approximately 85 grams of cocaine through evidence that the cocaine was found with male toiletries. A rational trier of fact could reasonably infer that defendant had a right to exercise control over the cocaine and was aware of its presence. And while the prosecution was not required to prove an intent to deliver, the evidence that defendant constructively possessed the cocaine is further buttressed by circumstantial evidence that defendant was involved in selling cocaine. In addition to the ledger and packaging materials found in the vicinity of the cocaine, there was evidence that defendant's jacket contained $8,000 in cash bundled in increments of $1,000. The prosecutor's rebuttal witness, Marquette City Police Officer Mathias Munger, testified that it is not uncommon for persons engaged in drug sales to bundle cash in $1,000 increments to pay the supplier. Although defendant denied knowledge of the cocaine, the totality of the circumstances showed a sufficient nexus between defendant and the cocaine to establish his constructive possession beyond a reasonable doubt.

III. Great Weight of the Evidence

[1] We review a challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We review all of the evidence, whether direct or circumstantial, in a light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421, 428; 646 NW2d 158 (2002). "[T]he prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *Id.* at 423-424, quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). It is the trier of fact's function to determine the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant argues that a new trial is warranted on the ground that the verdict was against the great weight of the evidence. *People v Lemmon*, 456 Mich 625, 635; 576 NW2d 129 (1998). Defendant preserved this issue by moving for a new trial on this ground. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).[2]

> The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." [] *Lemmon*, [*supra* at] 647[.] "Unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646 (citation omitted). [*Musser, supra*, at 218.]

Here, the trial court correctly found no basis for independently evaluating the credibility of the trial witnesses. Although the testimony raised credibility issues for the jury to resolve, the evidence did not preponderate heavily against the jury's determination that defendant possessed the cocaine found in the motel room. Only defendant's testimony, as corroborated by Betker's testimony that she did not see any drugs in the motel room before leaving for the restaurant, supported defendant's theory that someone else might have placed the cocaine in the motel room. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

IV. Motion to Suppress

Defendant asserts that the trial court erred in denying his pretrial motion to suppress the money, cocaine, and other evidence seized by law enforcement officers during the search of the motel room. Defendant claims that Betker's consent to the search of the motel room was involuntary and, in any event, she could not consent to a search of his jacket or the plastic Econo Food bag containing toiletries and the cocaine.[3]

In determining whether a violation of the Fourth Amendment protection against unreasonable searches and seizures occurred, a court must first ascertain whether the defendant

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[2] We review a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Cress*¸ 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

[3] We review a trial court's findings of fact at a suppression hearing for clear error. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). A trial court's resolution of factual issues are entitled to deference, especially where factual issues involve the credibility of witnesses whose testimony conflicts. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). The trial court's ultimate decision on the motion is reviewed de novo. *Bolduc, supra* at 436.

has standing to challenge the search. *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999). Standing requires that a person have a special interest in the area searched or the article seized. *People v Jordan*, 187 Mich App 582, 589; 468 NW2d 294 (1991). The person must have a reasonable expectation of privacy in the object or area of intrusion. *Id.*

Here, there is no dispute that defendant, as an occupant of the motel room, had a reasonable expectation of privacy in the place (motel room) searched. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). Therefore, the burden was on the prosecutor to establish a valid consent to search to motel room. *Jordan, supra* at 587.

A third party may consent to a search where the consenting person has an equal right or possession or control of the premises. *Id.* Consent may also be valid where the police, at the time of entry, reasonably believe that the consenting person possesses common authority over the premises. *People v Goforth*, 222 Mich App 306, 312; 564 NW2d 526 (1997). The consent must be freely and voluntarily given to be valid. *People v Williams*, 472 Mich 308, 318; 696 NW2d 636 (2005). The voluntariness of consent is a question of fact determined under the totality of the circumstances. *Schneckloth v Bustamonte*, 412 US 218, 227; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

Even if voluntary, a third party's consent is invalid if the other party is present and expressly objects to the search. *People v Lapworth*, 273 Mich App 424, 427; 730 NW2d 258 (2006). But the police have no obligation to seek consent from the other party, even if the other party is nearby in a squad car. *Id.* at 427-428. Although a fine line, "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out. " *Georgia v Randolph*, 547 US 103, 121; 126 S Ct 1515; 164 L Ed 2d 208 (2006).

Here, conflicting testimony was presented regarding the circumstances of Betker's consent to the search. The trial court found that Betker's testimony was not credible, and that the credible testimony of the police officers established that Betker properly and voluntarily consented to the search. Giving deference to the trial court's assessment of the credibility of the witnesses, we find no clear error. Officer Hanes testified that it was only after he and Trooper O'Connor waited 40 to 50 minutes for defendant to return to the motel that a decision was made to go to the restaurant to arrest defendant. Trooper O'Connor was transporting defendant to the jail when Office Hanes spoke with Betker about searching the motel room. Officer Hanes testified that he was told by Betker that she and defendant were staying in the room, that Betker consented to the search, and that Betker used a key to open the door to allow the officers to search the room. He indicated that "I told her several times that she did not have to consent to search this room, to let me search this room." Importantly, Betker also signed a written consent form when she agreed to the search and she testified that she was neither frightened nor intimidated into doing so. Because Officer Hanes had no affirmative duty to seek out defendant's consent and the evidence that Betker's consent to the search was voluntary, the trial court did not clearly err in finding that consent was validly obtained based on Betker's actual and apparent status as a co-renter and occupier of the room.

Defendant also argues that, even if consent to search the motel room was properly obtained, the consent did not authorize a search of his jacket or the plastic Econo Food bag. We

disagree. As the trial court reasoned, defendant's expectation of privacy is relevant in evaluating whether these objects, and the money and other items contained therein, should be suppressed. Defendant must demonstrate a reasonable expectation of privacy in the object or area of intrusion. *Jordan, supra* at 589. Defendant must, by his conduct, exhibit an actual expectation of privacy, that is, that he sought to preserve something as private. *United States v Waller*, 426 F3d 838, 844 (CA 6, 2005). If an actual expectation of privacy exists, defendant must demonstrate that it is one that society is prepared to recognize as reasonable. *Id.*; see also *Jordan, supra* at 589.

Although defendant testified that he owned the jacket, Officer Hanes indicated that it was located on a rack directly behind the entry door of the motel room. Officer Hanes testified that Betker told her as they entered the motel room that the only item that belonged to her was a purse. Marquette County Sheriff's Deputy Scott Stade testified that he believed that it was a male jacket that contained the money he found in a partially zipped pocket. Although he discovered the money by reaching into the pocket, Deputy Stade testified that it would have been visible by closely looking at the jacket.

We find no clear error in the trial court's finding that the jacket with the bulging cash in the partially unzipped pocket was not concealed in such a way as to indicate any intent to maintain a zone of privacy from Betker. This case is distinguishable from *Jordan, supra* at 592, where a hospital had possession of a defendant's clothing as a bailee. Having chosen to hang the jacket in an area subject to Betker's joint access and control, defendant placed it within the scope of her general consent. Cf. *United States v Buckles*, 495 F2d 1377, 1381-1382 (CA 8, 1974) (evidence in jacket admissible against the defendant, even though the occupant who provided consent for the search of the house denied ownership of the jacket).

We also uphold the trial court's decision to deny suppression of the evidence seized from the plastic Econo Food bag. Defendant's reliance on *United States v Fultz*, 146 F3d 1102 (CA 9, 1998), is misplaced because that case involved the defendant's use of a closed container to store personal belongings in a specific part of another person's garage. The court held that a person has an expectation of privacy in closed containers, which is not forfeited merely because the person places the closed container in a place not controlled exclusively by the container's owner. *Id.* at 1105. It also found that the garage owner had no authority, actual or apparent, to consent to a search, where the police were told by the garage owner that the closed container belonged exclusively to the defendant. *Id.* at 1106.

"[A]pparent authority turns on the government's knowledge of the third party's use of, control over, and access to the container to be searched, because these characteristics are particularly probative of whether the individual has authority over the property." *United States v Basinski*, 226 F3d 829, 834 (CA 7, 2000). The issue of apparent authority depends, in part, on the nature of the container. *Id.* at 834. As an example, "it is less reasonable for a police officer to believe that a third party has full access to a defendant's purse or a briefcase than, say, an open crate." *Id.* at 834. Also relevant to this determination is any precautions taken by the defendant to ensure privacy, such as locks for the container or the government's knowledge of a defendant's order that the third party not open the container. *Id.* at 835; see also *Marganet v Florida*, 927 So 2d 52, 60-61 (Fla App, 2006) (discussing various factors bearing on the right of a third party to consent to a search of a container). A police officer's belief in the third party's

ability to consent to the search must be reasonable under the circumstances. *Goforth*, *supra* at 306.

Here, Officer Hanes testified that the plastic Econo Food bag was on a bed in the motel room. The bag was open and he could see a razor and shaving gel when he looked in it. Given the exposure of the bag and its contents in the motel room that defendant shared with Betker, we find no clear error in the trial court's determination that, as with the jacket, the items in the bag were not concealed in a way to indicate any intent by defendant to maintain a zone of privacy from Betker. Therefore, the bag falls within the scope of Betker's consent. Although the cocaine and other items in the open bag were not in plain view, it was reasonable for Officer Hanes to recognize that Betker had access to and the apparent authority to consent to a search of the open bag, notwithstanding her statement that only the purse belonged to her.

We note that defendant does not address the trial court's ruling that he lacked standing to contest the admission of the drugs and other items that were the fruit of the search, except for the cash, by denying ownership of the items. "Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). See also *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (failure to brief a necessary issue precludes appellate relief). In any event, having concluded that the trial court did not clearly err in finding that the jacket and plastic Econo Food bag were within the scope of a valid, consensual search, it is unnecessary to consider this additional standing issue.

We also find it unnecessary to consider defendant's argument that the search of the motel room could not be justified as a permissible search of a parolee under administrative regulations. We note that, contrary to defendant's argument on appeal, the trial court decided this issue in its April 9, 2007, amended opinion and order denying the motion to suppress. Further, the record shows that defense counsel was given an opportunity to address this issue after the court issued its amended opinion, and that the court found no basis for changing its decision when addressing this issue at sentencing.

V. Trial Court's Evidentiary Rulings

Defendant challenges three of the trial court's evidentiary rulings at trial.[4] Specifically, defendant argues that the trial court erred in admitting evidence of the marijuana found in the motel room, which defendant argued was irrelevant and prejudicial.

MRE 403 provides that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." The notion of "unfair prejudice" concerns whether (1) a jury will give undue or preemptive weight to marginally probative

[4] We review a trial court's evidentiary decisions for an abuse of discretion, but preliminary questions of law bearing on the decision are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion by choosing an outcome outside of the range of principled outcomes. *Carnicom*, *supra* at 616-617.

evidence and (2) it would be inequitable for the proponent to use the evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Here, the trial court properly found that the evidence was relevant to complete the alleged crime scene. Further, considering that the prosecutor was attempting to circumstantially prove defendant's constructive possession of the cocaine, the trial court did not abuse its discretion by refusing to exclude the evidence under MRE 403. The more the jurors knew about the condition of the motel room, the better equipped they were to perform their duty. See generally *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).

Defendant claims that the trial court erred by allowing the prosecutor to publish the ledger found in the motel room, along with another trial exhibit containing defendant's known handwriting, for the purpose of allowing the jury to compare the handwriting. Defendant argues that the jury was not qualified to perform an expert examination of the handwriting to determine if he wrote the ledger.

The admissibility of evidence depends on the purpose for which it is offered. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Here, while the prosecutor offered to publish the two exhibits so that the jury could look at the handwriting, we find no support for defendant's claim that the jury was asked to function as experts in conducting the review. Nor are we persuaded that expert evidence is required for a jury to make a handwriting comparison. Although handwriting expert testimony has a long history of admissibility in courts, "the role of the handwriting expert is primarily to draw the jury's attention to similarities between a known exemplar and a contested sample." *United States v Crisp*, 324 F3d 261, 271 (CA 4, 2003). The jury is permitted to make its own comparison from the evidence admitted at trial. *Vinton v Peck*, 14 Mich 287 (1866); see also *United States v Saadey*, 393 F3d 669, 679-680 (CA 6, 2005); MRE 901(b)(3) (requirement of authentication or identification for the admissibility of evidence satisfied by "[c]omparison by the trier of fact or by expert witnesses with specimens which have been authenticated").

Defendant complains that the trial court erred by overruling his objection to the rebuttal testimony of Marquette City Police Officer Mathias Munger on the ground that it should have been presented in the prosecutor's case in chief. Defendant challenges Officer Munger's testimony that the money in the motel room was bundled in a manner consistent with the way that money is packaged by people dealing in drugs, as well as Officer Munger's related testimony regarding the monetary value of the cocaine and the use of a ledger of the type found in the motel room for drug transactions.

The admissibility of rebuttal testimony is within the sound discretion of the trial court. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The trial court must "evaluate the overall impression that might have been created by the defense proofs" in determining the admissibility of rebuttal testimony. *Id.* Rebuttal evidence is admissible to contradict, dispel, explain or disprove the defendant's evidence. *Id.* at 399. The test is not whether it could have been introduced in the prosecutor's case in chief, but rather whether it is properly responsive to evidence introduced or a theory developed by the defendant. *Id.* at 399.

Here, defendant claimed ownership of the money found in the motel room, but denied that it had anything to do with cocaine. He testified that the source of the money was a life insurance policy, the sale of a vehicle, and casino winnings. He stated that it was bundled with

rubber bands in a manner in which he usually carries money. Defendant denied knowledge of a number of items found in the motel room after his arrest, including the cocaine, plastic bags, ledger, and rubber bands found on the bed.

The trial court allowed Officer Munger's testimony to rebut defendant's contention that no drug operation was taking place in the motel room. Regardless of whether the prosecutor could have produced the testimony in his case in chief, the trial court did not abuse its discretion in allowing the rebuttal testimony because it was responsive to defendant's testimony. Defendant created the impression, through his testimony, that someone placed the cocaine and other items in his motel room while he and Betker were at the restaurant, but left his unrelated money in the room. The trial court reasonably concluded that Office Munger's testimony would rebut the contention that there was no drug operation taking place. The testimony tended to weaken defendant's claim that his money was unrelated to the cocaine. *Figgures, supra* at 399.

VI. Prosecutorial Misconduct

Defendant raises multiple claims of prosecutorial misconduct, most of which were not preserved with an appropriate objection at trial. We generally review a claim of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting the defendant's substantial rights. *Id.* at 451; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant argues that the prosecutor improperly disclosed irrelevant and highly prejudicial information during jury selection by advising potential jurors that defendant was arrested for a parole violation, and thereafter eliciting testimony regarding the arrest and referring to it in his opening statement and closing argument. Defendant has not established an error, plain or otherwise, with respect to the prosecutor's comments or evidence. Prosecutorial misconduct may not predicated on a prosecutor's good-faith effort to admit evidence. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Further, a prosecutor is free to argue the evidence and reasonable inferences arising therefrom. *Cox*, *supra* at 451.

Here, in addition to explaining the circumstance under which the search took place, evidence of the parole violation was relevant to defendant's own explanation at trial for why he was present in the motel room with a substantial amount of money. Indeed, defense counsel asserted in his opening statement, "you'll learn where he got that money from. And, in fact, where he got it from was he left Grand Rapids, which is why he was cited for a parole violation, because he never notified a parole officer, he had with him $10,000 he received from a life insurance policy after his father died." "A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Contrary to defendant's argument on appeal, the prosecutor's closing remarks about the effect of defendant's parole status did not amount to an improper civic duty argument. A civic duty argument is one that injects issues broader than the defendant's guilt or innocence or encourages jurors to suspend their powers of judgment. *People v Thomas*, 260 Mich App 450,

456; 678 NW2d 631 (2004). Examined in context, the prosecutor here urged the jury *not to* speculate about what might happen to defendant because of his parole status. Further, any perceived prejudice was cured by the trial court's later instruction that the jury was to decide the case based only on the evidence and that the "lawyers' statements and arguments are not evidence." *Brown, supra* at 456.

We also disagree with defendant's argument that the prosecutor improperly suggested that defendant had been in prison for a serious charge when the prosecutor stated, "You know he's been in prison, but you don't know why and it's not admissible evidence. Do not presume that he was in for some very serious charge or for some very unserious charge. It's not admissible." While a prosecutor should refrain from denigrating a defendant with intemperate and prejudicial remarks, *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995), we find no support for defendant's argument that the remark here constituted an improper attack that deprived him of a fair trial. On the contrary the purpose of the remark was to focus the jury's attention on the evidence admitted at trial, and away from speculation about defendant's background.

In light of our determination that the trial court did not err in admitting the marijuana evidence, we also reject defendant's claim that the prosecutor engaged in misconduct by introducing the evidence. Further, the prosecutor did not engage in any misconduct by introducing evidence relative to the ledger or scale found in the motel room.

We agree with defendant that the prosecutor's remark in his opening statement that he had never seen $9,000 before was not relevant and lacked evidentiary support. A prosecutor may not make, through argument, a statement of fact to the jury of which only he or she has knowledge. *People v Ignofo*, 315 Mich 626, 633; 24 NW2d 514 (1946). Examined in context, the prosecutor's remark, "Here's some of the money spread out, just to give you an idea of what it looks like, because, you know, in my personal life, I've never seen $9,000 cash," was merely offered to explain why the prosecutor was displaying the money. Further, the trial court instructed the jury before the prosecutor's remarks that opening statements are not evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The prosecutor's challenged remark was not outcome determinative of any issue and, therefore, did not affect defendant's substantial rights. *Schultz, supra* at 720-722.

Further, the prosecutor's comment in closing argument about the $9,000 in cash containing a large number of $20 bills from drug sales also fails to establish any basis for reversal. The prosecutor was free to argue reasonable inferences from the evidence. *Cox, supra* at 451.

Defendant also contends that during cross-examination the prosecutor improperly elicited testimony that defendant was unemployed, and also improperly commented on his unemployment in his rebuttal argument. Defendant asserts that the prosecutor improperly used this evidence to denigrate his credibility and suggest a motive. Defendant has not established that the prosecutor acted in bad faith in eliciting and commenting on this evidence. *Dobek, supra* at 70. The prosecutor's cross-examination was directed at the financial resources being used by defendant to support himself and his explanation for the $9,000 in cash that was found in the motel room. The prosecutor did not attempt to portray defendant as poor, but simply bolstered

his argument that the source of defendant's cash was drug sales. Although evidence of unemployment is not admissible to show motive or evidence of a witness' credibility, it may be admissible to rebut a defendant's theory of the case. *People v Conte*, 152 Mich App 8, 14; 391 NW2d 763 (1986).

The prosecutor commented on the evidence in his rebuttal argument, in apparent response to defense counsel's argument that a drug dealer would not have laid out the drugs and other items on the bed in the motel room, by remarking, "The guy has moved up here, he's been here eight months with no job. How is he supporting himself? If he's dealing drugs on a consistent basis, doesn't he get comfortable? . . . And so when you lay out your drug store, you just lay it out. You don't hide it. You become comfortable in how you live." "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship that they bear to the evidence at trial." *Schutte, supra* at 721. Considering the responsive nature of the prosecutor's remarks, we find no error requiring reversal. *Id.*

Defendant further argues, for the first time on appeal, that the prosecutor elicited irrelevant and prejudicial information that it was difficult to check out his story. During the prosecutor's cross-examination of defendant, the following exchange occurred:

> *Q*. And we certainly haven't talked about this?
>
> *A*. No.
>
> *Q*. So it's a little hard – a little late for me to be going and checking to see whether or not your story is accurate, that you did talk – or your mother, I think it was, talked to your probation officer.
>
> *A*. Yeah, um-h'm.
>
> *Q*. A little hard for me to check on that, isn't it, now?
>
> *A*. Yeah. I guess you could call the parole office, I believe.

In light of the trial court's later instruction to the jury that "[t]he lawyers' questions to witnesses are also not evidence. You should consider those questions only as they give meaning to the witness's answer – answer," we find no support for defendant's claim of error. Defendant's argument provides no persuasive reason for finding that the prosecutor acted in bad faith. *Dobek, supra* at 70. The prosecutor's cross-examination brought into question the timing of defendant's disclosure that he was planning to return to Grand Rapids, with money obtained from lawful sources, for the purpose of turning himself in for his parole violation. Cross-examination on a matter where it would have been natural for the defendant to come forward and report is permissible, albeit it raises constitutional concerns when it involves a defendant's post-*Miranda*[5] silence. *People v Alexander*, 188 Mich App 96, 103-104; 469 NW2d 10 (1991); see

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

also *People v Dennis*, 464 Mich 567; 628 NW2d 502 (2001); *People v Shafier*, 277 Mich App 137, 140; 743 NW2d 742 (2007), lv gtd 480 Mich 1193 (2008).

In any event, even if the prosecutor's cross-examination constituted plain error, it was not outcome determinative in this case. *Schutte, supra* at 720. The prosecutor had other means for attacking the weakness of the defense, which included evidence that defendant objected to a forfeiture of the money after he was arrested, but made no claim of ownership. Further, the prosecutor cross-examined defendant regarding whether he took any steps to find documents or witnesses to corroborate his testimony. The prosecutor properly could comment on defendant's failure to offer evidence in support of a defense theory. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). We disagree with defendant's claim that the prosecutor shifted the burden of proof to him by doing so in closing argument. The prosecutor did not suggest to the jury that defendant had the burden of proof, but rather that his testimony was designed so that it could not be verified. Further, the trial court instructed the jury:

> The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. This includes verification of the defendant's claimed receipt of money from life insurance, car sale, and casino winnings, none of which he has to prove. However, the prosecutor may attack his claims about how he got the money.

This instruction was sufficient to dispel any prejudice and, therefore, no basis for reversal exists. *Abraham, supra* at 279; *Schultz, supra* at 720-722.

Defendant also argues that the prosecutor improperly denigrated defense counsel by remarking in closing argument that counsel made a vague opening statement so that "the defense could vary its approach, depending on what the evidence turns out to be." The purpose of opening statement is to make a full and fair statement of the case and the facts intended to be proved. MCR 6.414(C). A prosecutor may not personally attack defense counsel or suggest in closing argument that defense counsel intentionally attempted to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). But a prosecutor may comment on the weakness of a defense theory advanced at trial and the failure to offer evidence in support of a defense theory. *Fields, supra* at 115-116.

Here, defense counsel proposed during his opening statement that the jury would find that someone other than defendant and Betker had access to the motel room. Although the prosecutor characterized counsel's opening statement as vague, the prosecutor did not suggest that defense counsel was attempting to mislead the jury or was unprepared, but rather questioned whether there was evidence to support the defense theory that someone else placed the cocaine in the motel room and whether it would make sense for someone to do so. But even if we were to conclude that it was improper for the prosecutor to refer to counsel's opening statement as vague, we are not persuaded that this characterization affected the outcome. The trial evidence supported the prosecutor's argument that the defense theory was speculative.

Further, the prosecutor's rebuttal argument that "[s]peculating is saying that maybe it could have, would have, should have, could have happened, and maybe the cocaine fairy came," was not plainly improper. A prosecutor need not state an argument in the blandest possible

terms. *Schultz, supra* at 722. Indeed, we note that defense counsel used similar language in his own closing argument when arguing that the jury would not have to "speculate about an imaginary drug fairy" because the defense theory was that Stephanie and her boyfriend, Terry Barfield, could have put the cocaine in the motel room. "Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *Schutte, supra* at 721.

We also reject defendant's claim that the trial court erred when it overruled his objection to the prosecutor's comment regarding evidence that Barfield was involved in babysitting his daughter. Examined in context, the prosecutor was not attempting to portray defendant as a bad parent. Rather, the prosecutor was commenting on defendant's relationship with Barfield in response to the defense theory that Barfield could have placed the cocaine in the motel room.

Defendant also argues that the trial court incorrectly overruled his objection to the prosecutor's closing argument that Betker was addicted to cocaine. Even if the trial court erred in finding circumstantial evidence to support the prosecutor's argument, it did not deprive defendant of a fair trial. Defense counsel appropriately responded by remarking in his closing argument, "Where in this evidence did you hear anything about her being an addict." Further, the trial court later instructed the jury that neither the lawyers' arguments nor its "comments, rulings, questions, and instructions" constitute evidence. The trial court's instructions were sufficient to dispel any prejudice. *Bahoda, supra* at 281; *Abraham, supra* at 279. We find nothing about the prosecutor's later remark that Betker would have put the cocaine to good use, if a search was not conducted, or the prosecutor's comment in rebuttal argument that "[i]n the world of being a drug dealer, you get your drugs from your boyfriend dealer, but you do not take the fall for him," to warrant a different result. The gist of the prosecutor's argument was that neither Stephanie nor Betker was entirely truthful at trial and, in particular, that they had lied about their participation in the charged crime. The prosecutor's general remark about the drug world was not so egregious that it could not have been cured have by a jury instruction.

Finally, defendant argues that the cumulative effect of the prosecutor's improper conduct deprived him of a fair trial. Only actual errors are considered in determining their cumulative effect. *Bahoda, supra* at 292 n 64. We are unpersuaded that defendant has demonstrated actual errors that, cumulatively considered, denied defendant a fair trial. "Defendant was entitled to a fair trial, not a perfect one." *Abraham, supra* at 279.

VII. Ineffective Assistance of Counsel

Defendant summarily argues that, in the event he does not succeed on any issue raised on appeal that was not properly preserved in the trial court, then a new trial should be ordered based on ineffective assistance of counsel. We decline to consider this argument because it is insufficiently briefed. *Kevorkian, supra* at 389.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Jane M. Beckering